

1 Todd M. Friedman (SBN 216752)  
2 Meghan E. George (SBN 274525)  
3 Adrian R. Bacon (SBN 280332)  
4 LAW OFFICES OF TODD M. FRIEDMAN, P.C.  
5 21031 Ventura Blvd., Suite 340  
6 Woodland Hills, CA 91364  
7 Phone: 323-306-4234  
8 Fax: 866-633-0228  
9 tfriedman@toddflaw.com  
10 mgeorge@toddflaw.com  
11 abacon@toddflaw.com  
12 **Attorneys for Plaintiffs**

13  
14  
15  
16 **UNITED STATES DISTRICT COURT**  
17 **EASTERN DISTRICT OF CALIFORNIA**

18  
19 **MARK AUSSIEKER**, individually  
20 and on behalf of all others similarly  
21 situated,

22 Plaintiffs,

23 v.

24 **GOLDWATER BANK, NATIONAL**  
25 **ASSOCIATION; DOES 1-10**  
26 Inclusive,

27 Defendant.

28 **Case No.:**

**CLASS ACTION**

**COMPLAINT FOR DAMAGES  
AND INJUNCTIVE RELIEF  
PURSUANT TO THE  
TELEPHONE CONSUMER  
PROTECTION ACT, 47 U.S.C. §  
227, ET SEQ.**

**JURY TRIAL DEMANDED**

29  
30 **INTRODUCTION**

31 1. MARK AUSSIEKER (“Plaintiff”), brings this Class Action  
32 Complaint for damages, injunctive relief, and any other available legal or equitable  
33 remedies, resulting from the illegal actions of GOLDWATER BANK,  
34 NATIONAL ASSOCIATION (“Defendant”), in negligently contacting Plaintiff on  
35 Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection  
36 Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”) and related regulations. Plaintiff alleges  
37 as follows upon personal knowledge as to himself and his own acts and  
38

1 experiences, and, as to all other matters, upon information and belief, including  
2 investigation conducted by his attorneys.

3       2. The TCPA was designed to prevent calls and messages like the ones  
4 described within this complaint, and to protect the privacy of citizens like Plaintiff.  
5 “Voluminous consumer complaints about abuses of telephone technology – for  
6 example, computerized calls dispatched to private homes – prompted Congress to  
7 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

8       3. In enacting the TCPA, Congress intended to give consumers a choice  
9 as to how creditors and telemarketers may call them, and made specific findings  
10 that “[t]echnologies that might allow consumers to avoid receiving such calls and  
11 messages are not universally available, are costly, are unlikely to be enforced, or  
12 place an inordinate burden on the consumer.   TCPA, Pub.L. No. 102–243, § 11.  
13 Toward this end, Congress found that

14  
15                   [b]anning such automated or prerecorded telephone calls to the home,  
16 except when the receiving party consents to receiving the call or when  
17 such calls are necessary in an emergency situation affecting the health  
18 and safety of the consumer, is the only effective means of protecting  
19 telephone consumers from this nuisance and privacy invasion.

20       *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL  
21 3292838, at\* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s  
22 purpose).

23       4. Congress also specifically found that “the evidence presented to the  
24 Congress indicates that automated or prerecorded calls are a nuisance and an  
25 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,  
26 *Mims*, 132 S. Ct. at 744.

27       5. In a recent decision, the Supreme Court interpreted the term  
28 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic  
telephone dialing system,’ a device must have the capacity either to store a

1 telephone number using a random or sequential generator *or* to produce a telephone  
2 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,  
3 141 S.Ct. 1163 (2021) (emphasis added).

4 6. In *Duguid*, the Supreme Court provided an example of such systems,  
5 stating: “For instance, an autodialer might use a random number generator to  
6 determine the order in which to pick phone numbers from a preproduced list. It  
7 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

8 7. Further, both *Duguid* and the legislative history of the TCPA are clear  
9 that the original focus on prerecorded voice technology prohibition was the fact  
10 that such communications involved agentless calls, not on the question of whether  
11 a literal voice was used during those agentless calls. *See* Hearing Before the  
12 Subcommittee on Communications of the Committee on Commerce, Science and  
13 Transportation, United States Senate One Hundred Second Congress First Session  
14 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC  
15 Recd. 8752 (F.C.C. September 17, 1992).

16 8. The Sixth Circuit has also recognized this distinction: “Congress drew  
17 an explicit distinction between ‘automated telephone calls that deliver an artificial  
18 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’  
19 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*  
20 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

21 9. Similarly, the FTC has observed that “prerecorded calls are by their  
22 very nature one-sided conversations, and if there is no opportunity for consumers  
23 to ask questions, offers may not be sufficiently clear for consumers to make  
24 informed choices before pressing a button or saying yes to make a purchase.” 73  
25 FR 51164-01, 51167 (Aug. 29, 2008).

26 **JURISDICTION AND VENUE**

27 10. Jurisdiction is proper under 28 U.S.C. § 1331 because this action

arises under a federal statute, namely the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*

11. Venue is proper in the United States District Court for the Eastern District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendant does business within the state of California and Plaintiff resides within this district.

## PARTIES

12. Plaintiff is, and at all times mentioned herein, was a citizen and resident of the State of California, County of Sacramento. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39). Plaintiff was physically in California at the time he received the alleged text messages from Defendant.

13. Plaintiff is informed and believes, and thereon alleges, that Defendant is a National Association. Defendant, and all of its agents, are and at all times mentioned herein were “persons,” as defined by 47 U.S.C. § 153 (39). Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of Sacramento, and within this judicial district.

## FACTUAL ALLEGATIONS

14. At all times relevant, Plaintiff was a citizen of Sacramento County, and a citizen of the State of California. Plaintiff is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. § 153 (39).

15. Defendant is, and at all times mentioned herein was, a "person," as defined by 47 U.S.C. § 153 (39).

16. At all times relevant Defendant conducted business in the State of California and in the County of Sacramento, within this judicial district.

17. On or about May 20, 2021, Plaintiff received a text message from Defendant on his cellular telephone number ending in -8006.

18. Specifically, the text message read:

1                   GW Bank offers FHA/VA/Conv & Jumbo Construction &  
2                   Renovation for your clients up to \$1M! Text Greg @  
3                   415.205.8858 for information. Site: <https://t.ly/DRzs> Reply  
STOP to Opt-Out

4                   19. Defendant did not have Plaintiff's prior express consent to contact him  
5                   on his cellular phone.

6                   20. Based on the content and format of these text messages, Plaintiff  
7                   alleges that they were sent via Defendant's SMS Blasting Platform, i.e., an  
8                   "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227  
9                   (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

10                  21. The text message sent to Plaintiff's cellular telephone was not sent by  
11                  a live agent and thus created a one-sided conversation in which Plaintiff could not  
12                  receive a response to her questions and/or concerns. The text message also was sent  
13                  in an automated fashion as a result of computerized campaigns that were pre-  
14                  programmed in advance to send messages out to large groups of consumers all at  
15                  once, either sequentially or via algorithmic dialing, i.e. in an automated fashion by  
16                  a computer.

17                  22. In Merriam Webster's Dictionary, "voice" is defined as "an  
18                  instrument or medium of expression." It defines "artificial" as "humanly  
19                  contrived...often on a natural model : MAN-MADE" and "lacking in natural or  
20                  spontaneous quality."

21                  23. The messages sent to Plaintiff by Defendant using the SMS blasting  
22                  platform employed a text message as an instrument or medium of expression to  
23                  deliver an automatic message drafted in advance of being sent, i.e. that of an SMS  
24                  message, to convey a telemarketing communication to Plaintiff. SMS blasting  
25                  platforms are man-made humanly contrived programs which allow companies to  
26                  blast out such messages via non-spontaneous methods, i.e. automated methods  
27                  similar to that of an assembly line in a factory. Such SMS blasting devices are

1 incapable of spontaneity, as they must be programmed by the operator to  
2 automatically send messages out, *en masse*, pursuant to preprogrammed  
3 parameters.

4 24. Accordingly, Defendant's messages utilized an "artificial voice" as  
5 prohibited by 47 U.S.C. § 227(b)(1)(A).

6 25. In Merriam Webster's Dictionary, "prerecorded" is defined as  
7 "recorded in advance." "Recorded" is defined as "to set down in writing." The  
8 text message sent to Plaintiff's cellular telephone via an SMS blasting platform was  
9 set down in writing in advance by Defendant, whose employees wrote out the  
10 standard automated messages that were to be sent to Plaintiff and other class  
11 members, and by way of preprogrammed SMS blasting, entered the prerecorded  
12 message into the SMS Blasting platform, and thereafter sent these messages  
13 pursuant to scheduled blasts that were programmed by Defendant. Thus, Defendant  
14 employed a text message as an instrument or medium of expression to deliver a  
15 prerecorded message drafted in advance of being sent.

17 26. Thus, Defendant's messages utilized a "prerecorded voice" as  
18 prohibited by 47 U.S.C. § 227(b)(1)(A).

19 27. The telephone number that Defendant, or their agent texted were  
20 assigned to a cellular telephone service for which Plaintiff incur charges for  
21 incoming texts pursuant to 47 U.S.C. § 227 (b)(1).

22 28. These text messages constituted calls that were not for emergency  
23 purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

24 29. Plaintiff was never a customer of Defendant and never provided his  
25 cellular telephone number to Defendant for any reason whatsoever. Accordingly,  
26 Defendant and their agents never received Plaintiff's prior express consent to  
27 receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).

30. Such text messages constitute solicitation calls pursuant to 47 C.F.R. § 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

31. These text messages by Defendant, or its agents, violated 47 U.S.C. § 227(b)(1).

## CLASS ACTION ALLEGATIONS

32. Plaintiff brings this action on behalf of himself and on behalf of and all others similarly situated, as a member of the proposed Class.

33. Plaintiff represents, and is a member of, the Class, defined as follows: all persons within the United States who received any unsolicited text messages sent using an ATDS or an artificial or prerecorded voice from Defendant, which text message was not made for emergency purposes or with the recipient's prior express consent within the four years prior to the filing of the Complaint through the date of class certification.

34. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class, but believes the Class members number in the thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

35. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of the Class, and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to expand the Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.

36. The joinder of the Class members is impractical and the disposition of their claims in the Class action will provide substantial benefits both to the parties and to the court. The Class can be identified through Defendant's records or Defendant's agents' records.

37. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendant, either directly or through their

1 agents, illegally contacted Plaintiff and the Class members via their cellular  
2 telephones by using marketing and text messages, thereby causing Plaintiff and the  
3 Class members to incur certain cellular telephone charges or reduce cellular  
4 telephone time for which Plaintiff and the Class members previously paid, and  
5 invading the privacy of said Plaintiff and the Class members. Plaintiff and the  
6 Class members were damaged thereby.

7 38. There is a well-defined community of interest in the questions of law  
8 and fact involved affecting the Class members. The questions of law and fact  
9 common to the Class predominate over questions which may affect individual  
10 Class members, including the following:

11

12 a) Whether, within the four years prior to the filing of this Complaint  
13 through the date of class certification, Defendant or their agents sent  
14 any text messages (other than a message made for emergency  
15 purposes or made with the prior express consent of the called party)  
16 to a Class member using any automatic dialing system or artificial or  
17 prerecorded voice to any telephone number assigned to a cellular  
18 phone service;

19 b) Whether Plaintiff and the Class members were damaged thereby, and  
20 the extent of damages for such violation; and

c) Whether Defendant and their agents should be enjoined from  
21 engaging in such conduct in the future.

22 39. As a person that received at least one solicitation text message without  
23 Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the  
24 Class. Plaintiff will fairly and adequately represent and protect the interests of the  
25 Class in that Plaintiff has no interests antagonistic to any member of the Class.

26 40. Plaintiff and the members of the Class have suffered irreparable harm  
27 as a result of the Defendant's unlawful and wrongful conduct. Absent a class  
28 action, the Class will continue to face the potential for irreparable harm. In  
addition, these violations of law will be allowed to proceed without remedy and  
Defendant will likely continue such illegal conduct. Because of the size of the

individual member's claims, few, if any, members of the Class could afford to seek legal redress for the wrongs complained of herein.

41. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

42. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with federal and California law. The interest of the Class members in individually controlling the prosecution of separate claims against Defendant are small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

43. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

## FIRST CAUSE OF ACTION

**NEGLIGENCE VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT  
47 U.S.C. § 227(b)**

44. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

45. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

46. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b), Plaintiff and Class members are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

47. Plaintiff and Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

**SECOND CAUSE OF ACTION  
KNOWING AND/OR WILLFUL VIOLATIONS OF THE  
TELEPHONE CONSUMER PROTECTION ACT  
47 U.S.C. § 227(b)**

48. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

49. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

50. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and Class members are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

51. Plaintiff and Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

# PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and members of the Classes, the following relief against Defendant:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF  
THE TCPA, 47 U.S.C. § 227(b)**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

1 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF**  
2 **THE TCPA, 47 U.S.C. § 227(B)**

3

4

5

6

7

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C.  
8 § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member  
9 \$1,500.00 in statutory damages, for each and every violation, pursuant to  
10 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such  
11 conduct in the future.
- Any other relief the Court may deem just and proper.

12 **TRIAL BY JURY**

13 52. Pursuant to the seventh amendment to the Constitution of the United  
14 States of America, Plaintiff is entitled to, and demands, a trial by jury.

15 Dated: May 19, 2022

16 Respectfully submitted,

17 **THE LAW OFFICES OF TODD M. FRIEDMAN, P.C.**

18

19

20

21

22

23

24

25

26

27

28

By: s/ Todd M. Friedman  
TODD M .FRIEDMAN, ESQ.  
ADRIAN R. BACON, ESQ.  
ATTORNEY FOR PLAINTIFF